IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT.

Hanuman Mal vs. Laxmi Narain & anr.

S.B. Civil Second Appeal No.154/1985 against the judgment and decree dated 17.9.1984 passed by the learned Civil Judge, Ratangarh in Appeal No.18/1983.

Date of Judgment: January 04 , 2007.

PRESENT
HON'BLE MR. PRAKASH TATIA,J.

Ms.Dalpat Raj Bhandari for the appellant.
Mr. J.K. Bhaiya and Durga Ram for the respondents.

BY THE COURT:

This appeal is directed against the judgment and decree dated 18.11.1980 by which the plaintiff's suit for injunction was dismissed by the trial court and against the judgment and decree dated 17.9.1984 by which the first appellate court dismissed the appeal of the plaintiff.

Brief facts of the case are that the plaintiff filed the suit for injunction on 12.12.1970 alleging therein that the plaintiff is owner of one house. In the north-east side, defendants' house is situated and there is a way in between two houses which is shown as A to B in the sketch map produced by the plaintiff. The plaintiff sought prohibitory injunction against the defendants that the defendants be restrained

from obstructing the way. The suit was initially decreed by the trial court on 21.12.1974. The defendants preferred appeal before the first appellate court which was allowed by the first appellate court vide judgment and decree dated 3.5.1976 and the appellate court set aside the judgment and decree dated 21.12.1974 and remanded the matter to the trial court for framing an issue and retrial. The trial court framed the issue on 21.11.1977 and thereafter the plaintiff submitted application for amendment of the plaint on 13.10.1979 seeking permission of court to incorporate the prayer for removal of wall which has been raised by the defendants. That application was rejected by the order dated 27.3.1979. The trial court thereafter, dismissed the suit of the plaintiff vide judgment and decree dated 18.11.1980. The trial court held that the plaintiff failed to prove the land in question to be land of way and further held that on said land the defendants already raised constructions before filing of the suit by the plaintiff. The trial court also held that the defendants, from the evidence, have proved that the land is belonging to them and they are the owner of the land. The judgment and decree of the trial court dated 18.11.1980 was challenged by the plaintiff by filing appeal which was dismissed by the first appellate court vide judgment and decree dated 17.9.1984. Hence this second appeal.

Following substantial questions of law were framed by this Court

while admitting the appeal on 16.1.1986:-

> "(1) Whether the plaintiff was wrongly refused the relief sought on the ground that a mandatory injunction had not been sought for the removal of construction, which had already come into existence before the suit ?
>
> (2) Whether the courts below wrongly refused the amendment sought by the plaintiff in order to incorporate the relief for mandatory injunction in the suit ?"

The learned counsel for the appellant vehemently submitted that the first appellate court committed serious error of law in dismissing the appeal of the appellant after considering only prayer of the appellant-plaintiff of permission to amend the plaint. The first appellate court did not consider other grounds raised by the appellant. It is also submitted that the trial court as well as the first appellate court committed error of law in rejecting the application for amendment of the plaint filed by the plaintiff on the ground of delay whereas the plaintiff filed the application for amendment of the plaint within period of 1 year and two months as the issues were framed by the trial court on 21.11.1977. The learned counsel for the appellant pointed out that the plaintiff proved from evidence, i.e. Ex.2 map that the land in question is land of lane and cannot be land of the defendants.

The learned counsel for the respondents-defendants supported the judgment of the trial court and pointed out that before the first appellate court, the plaintiff-appellant did not press any of the points raised in the appeal and has not challenged the findings recorded by the

trial court on various issues and the appellant-plaintiff only challenged the order of the trial court by which the trial court refused amendment in the plaint. It is also submitted that it is wrong to say that the plaintiff's application for amendment application was filed within one year and two months from the framing of the issue. In fact the suit was filed in the year 1974. The construction was raised by the defendant on the land in dispute before filing of the suit by the plaintiff and that fact has been proved by the defendants. The application for amendment was not only filed by the plaintiff after about 9 years from the date of filing of the suit but after 13 years from raising of construction by the defendant. In view of the above, the courts were right in dismissing the application for amendment of the plaint. It is also submitted that the finding of the trial court is based on evidence and if the plaintiff raised any ground before the first appellate court to challenge the finding of the trial court and that has not been considered then the plaintiff-appellant could have submitted a review petition before the first appellate court and has no right to challenge the fact mentioned in the judgment about what transpired in the lower appellate court before this court.

I considered the submissions of the learned counsel for the parties and perused the record also.

It is clear that the plaintiff filed the suit on the basis of his Patta

dated 29.7.1943. The trial court after appreciation of evidence, held that the plaintiff failed to prove existence of the way and further the defendants raised construction in the year 1970 before plaintiff's filing the suit in the year 1974. The finding of fact recorded by the trial court is based on evidence and that is document produced by the plaintiff, Ex.2 and after considering the statement of PW-4 Koduram, who admitted that when the map was prepared, some wall was already raised and on some place there was fencing. Even the learned Munsiff also inspected the site and prepared the site inspection report wherein the learned Munsiff also mentioned that the lane is not in use. Despite this fact, the plaintiff filed the suit for mere prohibitory injunction. The fact of construction by the defendants were taken note by the first appellate court in the first round of litigation which is apparent from the judgment of the first appellate court dated 3.5.1976. The plaintiff sought amendment of the plaint after the remand order passed by the first appellate court. Therefore, the contention of the learned counsel for the appellant that the plaintiff filed the amendment application within short period of one month or two months is virtually wrong.

Otherwise also, from the evidence, it appears that the plaintiff failed to established the land in question to be the land of the lane. That finding of fact and the consequential relief in the form of mandatory or prohibitory injunction could have been granted by the

court below provided the fact of land being land of lane is proved by the plaintiff. When the plaintiff is not entitled to any relief because of the fact finding that the land is not of lane, the permission to amend the plaint is of no consequence.

In view of the above, if the trial court rejected the plaintiff's application for amendment for incorporation of relief, even then this cannot be a ground for setting aside of the order of the trial court permitting the plaintiff to incorporate the relief for which there is no factual foundation.

So far as the judgment of the first appellate court is concerned, the plaintiff has no right to challenge the judgment on the ground that the first appellate court has not considered other grounds which have not been pressed by the plaintiff-appellant before the first appellate court and the plaintiff-appellant himself also has not formulated the substantial questions of law that arguments were raised by the plaintiff-appellant before the first appellate court and were not considered by the first appellate court.

In view of the above, the appeal of the appellant is dismissed.

(PRAKASH TATIA),J.

mlt.